APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-3013 & 00-3437

NATIONAL SATELLITE SPORTS, INC.,
Plaintiff-Appellee,

v.

ELIADIS, INC., D/B/A MELODY LANE LOUNGE, ET AL.,
Defendants,

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
D/B/A TIME WARNER CABLE,
Defendant-Appellant.

[Argued May 2, 2001
Decided and Filed June 11, 2001]

Before: JONES, SILER, and GILMAN, Circuit Judges.

OPINION

GILMAN, Circuit Judge.

On the night of December 14, 1996, the Melody Lane Lounge, a commercial bar located in Massillon, Ohio, showed the live broadcast of a boxing match between Riddick Bowe and Andrew Golota (the event). National Satellite Sports, Inc. (NSS) had obtained the exclusive right to broadcast the event to commercial establishments in Ohio. Time Warner Entertainment Company, L.P. had obtained the exclusive right to broadcast the event on a pay-per-view basis to its Ohio residential customers. The Melody Lane Lounge,

erroneously listed as a residential customer of Time Warner, ordered the event through Time Warner's service.

After learning that the Melody Lane Lounge had shown the event to its patrons on the night in question, NSS brought suit against Eliadis, Inc., the corporate owner of the bar. The suit also named Eliadis's two owners and Time Warner as defendants. NSS alleged that the showing of the event in a commercial establishment through Time Warner's residential service constituted a violation of the Federal Communications Act of 1934, 47 U.S.C. §§ 151-613 (Communications Act), which, among other things, prohibits the unauthorized divulgence of wire or radio communications.

Eliadis and its co-owners reached a prompt settlement with NSS. NSS and Time Warner then filed cross-motions for summary judgment against each other. The district court first granted summary judgment to NSS on the issue of liability, and subsequently entered a final judgment awarding NSS damages, costs, and attorney fees.

Time Warner appeals the district court's rulings, claiming that the court erred in failing to give preclusive effect to an adverse judgment against NSS in prior litigation between the parties on an allegedly controlling issue. In the alternative, Time Warner claims that NSS lacks standing to sue under the Communications Act and, in any event, that NSS has failed to establish a violation of that statute. For all of the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

A. Factual background

NSS and Time Warner obtained their respective rights to broadcast the event through separate contracts. New Jersey Sports Productions, Inc., d/b/a Main Events (Main Events),

produced the event. It granted Pay Per View Networks, Inc., d/b/a Viewer's Choice (Viewer's Choice), the exclusive right to broadcast the event to residential households. Viewer's Choice, in turn, licensed Time Warner to make the telecast of the event available to residential customers in Ohio. Main Events granted Entertainment by J&J, Inc. (EJJ) a separate exclusive right to broadcast the event to commercial establishments. NSS obtained the right to be the commercial distributor of the event's telecast in Ohio from EJJ.

Main Events created a single telecast of the event and sent it to a transmission station. From the transmission station, the signal was sent to two different satellites. Viewer's Choice received the signal from one of the satellites. It decoded the signal, rescrambled it, and sent it to another set of satellites that transmitted the signal to a Time Warner facility in Akron, Ohio. The Akron facility, known as a "head end," receives programs via satellite and distributes them to subscribers in the Akron region. Because the event was a pay-per-view program, Time Warner encrypted it at the Akron head end so that only subscribers who had ordered the event would be able to decode and view the program.

NSS received its transmission of the telecast from a chain of distribution that traces back to the second satellite that received the initial signal from Main Events. As a result, the signals that NSS and Time Warner received in their respective Ohio facilities both originated from the same initial transmission sent by Main Events, and neither party disputes the right of the other to receive the signals in Ohio according to their separate contracts. Rather, the dispute centers on Time Warner allowing a commercial establishment to view the event on its residential-customer cable network.

Melody Lane Lounge's account was listed in the individual name of Gust Eliadis, a co-owner of Eliadis, Inc. In

February of 1996, Ken Sovacool, a Time Warner employee, serviced Eliadis's cable account. Time Warner concedes that Sovacool should have recognized that the Melody Lane Lounge was a commercial establishment and not a residence. The structure of the building, an exterior identification sign, and neon beer signs in the window made this obvious. Nevertheless, having obtained residential-cable service, the Melody Lane Lounge had the capability to order pay-per-view programs.

Time Warner's account records show that Melody Lane Lounge had ordered one earlier program at the commercial rate. But Melody Lane Lounge ordered the event in question from Time Warner at the residential rate of $39.95. As a commercial establishment, Melody Lane Lounge should have paid NSS for the right to show the event, which would have cost it $987.50.

NSS hired investigators to visit various commercial establishments to monitor whether those showing the event had obtained the right to do so through NSS as the proper distribution channel. An investigator visited the Melody Lane Lounge on the night in question and ultimately determined that it was broadcasting the event through Time Warner's residential pay-per-view system. The Melody Lane Lounge claims that it would not have chosen to show the event had it been required to pay NSS's high commercial rate. Only 23 patrons were in the bar at the time the event was broadcast.

B. Procedural background and prior litigation between the parties

NSS commenced its action in the United States District Court for the Northern District of Ohio in November of 1997. Eliadis, Inc. and its co-owners soon settled with NSS, agreeing to the entry of judgment against them for violating 47 U.S.C. § 605, which is part of the Communications Act, and

paying $250 in nominal damages. NSS's claim against Time Warner proceeded.

In July of 1999, the district court entered summary judgment in favor of NSS, finding that Time Warner had violated § 605. A bench trial on the issue of damages was held several months later. The district court determined that Time Warner was liable for $4,500 in statutory damages. NSS further sought and was awarded attorney fees and costs pursuant to 47 U.S.C. § 605(e)(3)(B)(iii), totaling $26,389.65, in March of 2000. Time Warner appeals the rulings of the district court, raising three alternative arguments.

First, Time Warner contends that the district court erred by failing to give preclusive effect to a separate district court judgment rendered in July of 1998 that arose from a substantially identical claim by NSS against Time Warner. NSS learned that a commercial establishment in Akron, Ohio called Lyndstalder, Inc., d/b/a Coach's Corner, had shown a boxing match between Evander Holyfield and Bobby Czyz that Coach's Corner obtained via residential-cable service from Time Warner in March of 1996. As in the case before us, Time Warner had obtained the exclusive right from the producer to distribute the match to residential customers in Ohio, while NSS received the exclusive license to sell the same program to Ohio's commercial establishments.

NSS commenced an action against Coach's Corner and its owner in the United States District Court for the Northern District of Ohio in August of 1997. When NSS learned of Time Warner's role in providing the broadcast to Coach's Corner, it added Time Warner as a defendant. In that suit, *National Satellite Sports, Inc. v. Lyndstalder, Inc. d/b/a/ Coach's Corner, et al.*, No. 5:97 CV 2039 (N.D.Ohio 1998), NSS alleged that both Coach's Corner and Time Warner had violated 47 U.S.C. § 605. Coach's Corner settled with NSS.

Time Warner then filed a motion for summary judgment, alleging that NSS had failed to establish either a contractual or a statutory claim against it.

The district court held a hearing on Time Warner's motion for summary judgment in July of 1998. It issued a bench ruling at that hearing, granting Time Warner's motion for summary judgment on the basis that NSS "failed to state a claim pursuant to the terms of the contracts [for distribution] at issue in this case as well as 47 U.S.C. § 605." NSS did not appeal. Time Warner argues that the *Coach's Corner* decision precludes NSS from raising the identical § 605 claim in the present case.

Second, even if we conclude that NSS is not bound by the *Coach's Corner* decision, Time Warner argues that NSS does not qualify as a "person aggrieved" under § 605(d)(6). It therefore contends that NSS lacks the standing to sue Time Warner for an alleged violation of § 605.

Finally, as its last line of defense, Time Warner argues that NSS's cause of action under § 605 fails because Time Warner did not "intercept" a communication within the meaning of the Communications Act. It maintains that the clear purpose of the Act is to prohibit and punish acts of communications piracy, which is far removed from what Time Warner says occurred in the present case. Although Time Warner concedes that NSS may have a claim against it based on state-law breach of contract, it argues that NSS has pursued the wrong cause of action under § 605.

II. ANALYSIS

A. Standard of review

We review de novo the district court's grant of summary judgment. *See, e.g., Holloway v. Brush*, 220 F.3d 767, 772 (6th Cir.2000). Summary judgment is proper when there are

no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed.R. Civ.P. 56(c). In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The judge is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue for trial exists only when there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252, 106 S.Ct. 2505.

We will not disturb a district court's determination of an award for damages unless clearly erroneous. *See Meyers v. City of Cincinnati*, 14 F.3d 1115, 1119 (6th Cir.1994).

B. NSS is not bound by the decision in *Coach's Corner*

NSS brought suit in both this case and in the *Coach's Corner* case under 47 U.S.C. § 605. Section 605 defines what constitutes the unauthorized publication or use of electronic communications. It includes such prohibited practices as the divulgence of wire or radio communications by persons authorized to receive them to others who are not so authorized, and the interception of any radio communication by a person not authorized to receive that communication from the sender. *See* 47 U.S.C. § 605(a). According to § 605, "[a]ny person aggrieved by any violation of subsection (a) of this section . . . may bring a civil action in a United States district court or in any other court of competent jurisdiction." 47 U.S.C. § 605(e)(3)(A). Furthermore, the statute directs that "the term 'any person aggrieved' shall include any person with proprietary rights in the intercepted communication by

wire or radio, including wholesale or retail distributors of satellite cable programming." 47 U.S.C. § 605(d)(6).

In its motion before the court in *Coach's Corner*, Time Warner argued that it was entitled to summary judgment because NSS was not a "person aggrieved" within the meaning of § 605(d)(6), and could therefore not pursue a claim for an alleged violation of § 605(a). NSS responded by arguing that standing to sue under § 605 is not limited to those who meet the statutory definition of a "person aggrieved."

The district court granted Time Warner's motion for summary judgment in the *Coach's Corner* case. In articulating its reasoning from the bench on July 13, 1998, the court held that NSS had failed to state a claim under *both* the contracts at issue in that case *and* under 47 U.S.C. § 605. The pertinent parts of the *Coach's Corner* ruling were as follows:

> With regard to the ruling, [NSS] has failed to state a claim pursuant to the terms of the contracts at issue in this case as well as 47 United States Code Section 605.
>
> . . . . .
>
> Paragraph 14(e) of the Television Licensing Agreement provides for the enforcement of unauthorized display of the closed circuit television feed. That also provides that Joe Hand Promotions [the licensor of the event] could not assert any piracy claim without prior notice.
>
> [The agreement] provides that a sublicensee [NSS] has no rights to enforceability, quote, "It being understood that your sublicensee shall have no right to commence or settle any claim or litigation hereunder."
>
> The other relevant agreement is the March 12, 1996 Closed Circuit Television Agreement entered into between [the licensor] and [NSS].

> That agreement at paragraph 7 provides that there is no right to a piracy action to be pursued by [NSS].
>
> [NSS's] effort to overcome the language of the contract does not create a material fact for trial.

Time Warner now argues that the district court below should have given preclusive effect to the earlier ruling in *Coach's Corner*. It claims that *Coach's Corner* determined that when a commercial establishment shows a sporting event ordered through a residential-cable service rather than properly paying the fees exacted by the commercial distributor, the distributor does not have standing to sue the authorized residential-service provider under § 605. NSS obviously disagrees.

Our circuit has held that a prior decision shall have preclusive effect on an issue raised in a later case if four elements are met:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Smith v. SEC, 129 F.3d 356, 362 (6th Cir.1997) (en banc) (quoting *Detroit Police Officers Ass'n v. Young*, 824 F.2d 512, 515 (6th Cir.1987)).

In the present case, the district court concluded that Time Warner had failed to establish the second and fourth elements of this test. Because Time Warner and NSS disagree as to whether these four elements were met, an analysis of each is necessary in order to decide if the district court erred by

failing to give preclusive effect to the *Coach's Corner* decision.

1. Identity of issues

Time Warner argues that the *Coach's Corner* court was faced with the precise threshold question that the district court encountered in the current case. This question is whether NSS has standing to sue under § 605; in particular, whether NSS had a proprietary interest in the communication that was sent from Time Warner via its authorized residential-cable service to its pay-per-view customers. Time Warner further contends that the bifurcation of the satellite transmission of the Holyfield/Czyz boxing match at issue in *Coach's Corner* was identical to the manner in which the event in question was sent to Time Warner and NSS in Ohio on December 14, 1996.

NSS counters that there is no identity of issues in these two cases. First, it contends that the transmissions at issue in *Coach's Corner* are distinguishable from the ones involved in the present case. Specifically, Time Warner distributed the Holyfield/Czyz boxing match to its residential customers through its Home Box Office (HBO) service, not through a pay-per-view network. The difference is that all residential HBO subscribers had access to view the Holyfield/Czyz match, whereas only the residential customers who ordered the Bowe/Golota event through the pay-per-view network could view the program. Second, NSS argues that the licensing agreements as between Time Warner and NSS were fundamentally different.

We believe that Time Warner's argument is the more persuasive on this "identity of issues" element. Although HBO and pay-per-view are different subscriber services, the key issue in both cases is the same — the consequences of a commercial establishment gaining access to view a boxing

match by being inaccurately listed as a residential customer of Time Warner. As a result, Time Warner has satisfied the first element for issue preclusion.

2. Necessary to the outcome of the prior proceeding

The district court held that Time Warner failed to establish that NSS's lack of standing under § 605 was necessary to the grant of summary judgment for Time Warner in *Coach's Corner*. It determined that the *Coach's Corner* decision was instead primarily based on the conclusion that NSS was contractually barred from pursuing an action against Time Warner because of the particular language in the license agreements involved in that case. As such, it held that the alternative ground in *Coach's Corner* for granting Time Warner's motion for summary judgment — namely, that NSS was not a "person aggrieved" under § 605 — was not necessary to that court's judgment.

Time Warner argues that the district court erred in reaching this conclusion. It notes that *Coach's Corner* is a case in which two alternative but independent grounds support the court's ultimate judgment. Time Warner claims that under the "weight of federal authority, a plaintiff is precluded from relitigating an issue actually decided against it in a prior case, even if the court in the prior case rested its judgment on alternative grounds." It cites the Second, Seventh, Ninth, and D.C. Circuits as upholding this general principle of issue preclusion. *See Williams v. Ward*, 556 F.2d 1143, 1154 (2d Cir.1977); *Magnus Elecs., Inc. v. La Republica Argentina*, 830 F.2d 1396, 1402 (7th Cir.1987); *In re Westgate California Corp.*, 642 F.2d 1174, 1176 (9th Cir.1981); *Yamaha Corp. of America v. United States*, 961 F.2d 245, 255 (D.C.Cir.1992).

This principle of issue preclusion, however, is counterbalanced by courts and commentaries that have adopted the

opposite conclusion. For example, the American Law Institute (ALI) endorses NSS's position that "[i]f a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." Restatement (Second) of Judgments § 27 cmt. i (1980). Furthermore, one leading commentary describes the Restatement's view as the "new" and "modern" rule. *See* 18 James Wm. Moore et al., Moore's Federal Practice ¶ 132.03[4][b] at 132-111 to 132-113 (3d ed. 1997). At least four circuits (the Third, Fourth, Eighth, and Tenth) have adopted this modern rule. *See Arab African Int'l Bank v. Epstein*, 958 F.2d 532, 535 (3d Cir. 1992); *Ritter v. Mount St. Mary's College*, 814 F.2d 986, 993-94 (4th Cir.1987); *Baker Elec. Co-op v. Chaske*, 28 F.3d 1466, 1475-76 (8th Cir.1994); *Turney v. O'Toole*, 898 F.2d 1470, 1472 n. 1 (10th Cir.1990). In addition, the Seventh Circuit has embraced the modern rule in the context of the Black Lung Benefits Act in *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008 (7th Cir.1997) (en banc), without citing its contrary holding in *Magnus Electronics*, 830 F.2d at 1402.

The issue is a close one given the policy implications involved. Time Warner argues that by not recognizing *Coach's Corner* as precluding relitigation of whether NSS has standing to sue under § 605, NSS is free to relitigate the same issue again. NSS counters by arguing that because the *Coach's Corner* court decided that NSS was contractually barred from pursuing a claim against Time Warner, NSS had no incentive to appeal that court's secondary decision that NSS failed to state a claim under § 605.

We find NSS's point persuasive because, while it might have won the "battle" over § 605, NSS would almost surely have lost the "war" in being unable to overcome the contractual prohibition on commencing litigation against Time

Warner. Furthermore, the district court's oral ruling in *Coach's Corner* transcribes into only a two-paragraph conclusory statement regarding NSS's claim under § 605, which was far overshadowed by the balance of its three-page discussion outlining the contractual obstacles that prevented NSS from suing Time Warner.

This circuit has not decided whether alternative grounds for a judgment are each "necessary to the outcome" for the purposes of issue preclusion in a subsequent case involving only one of the grounds. Based on the actual decision in *Coach's Corner*, we do not find it necessary to fully resolve this issue at the present time. We do hold, however, that where, as in *Coach's Corner*, one ground for the decision is clearly primary and the other only secondary, the secondary ground is not "necessary to the outcome" for the purposes of issue preclusion. *Coach's Corner*'s secondary holding that NSS failed to state a claim under § 605 was thus not necessary to the granting of Time Warner's motion for summary judgment.

3. Final judgment on the merits

Although the district court held that the *Coach's Corner* decision was a final judgment on the merits for the purpose of issue preclusion, NSS argues that it was not. In particular, it claims that the court's judgment in *Coach's Corner* was a dismissal of NSS's suit without prejudice for failure to state a claim. This argument is without merit. *Coach's Corner* granted Time Warner's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Furthermore, the district court made clear that its judgment was final. It recognized that "both parties will more than likely have a disagreement over everything I say, pretty much, and you can take it up to the Sixth Circuit and they can tell us whether I was right or wrong." Finally, summary judgment is recognized as a final judgment for the purpose of issue preclusion. *See Mayer v. Distel Tool & Mach. Co.*, 556

F.2d 798 (6th Cir.1977) (holding that where the facts and legal theory of a complaint are identical to those of a previous complaint, a grant of summary judgment on the prior complaint is a final judgment and could be the basis for issue preclusion in a subsequent case). Time Warner has therefore satisfied this third element for issue preclusion.

4. Full and fair opportunity to litigate

Turning to the final element, Time Warner contends that the district court in *Coach's Corner* granted its motion for summary judgment after full briefing and argument, and that both parties had a sufficient opportunity to litigate the § 605 issue before that court. NSS, however, argues that the district court in *Coach's Corner* primarily focused on the question of whether NSS's license agreement contractually barred it from initiating a suit against Time Warner. It therefore contends that the question of whether NSS had a proprietary right in the communication under § 605 was secondary. The district court agreed with NSS.

We believe that Time Warner has the more persuasive argument on this issue. Nothing in the *Coach's Corner* case prevented either NSS or Time Warner from raising all potential arguments about the applicability of § 605 to the circumstances of their case. Despite the contractual language that was ultimately held to bar NSS from raising a claim against Time Warner in *Coach's Corner*, NSS still had a full and fair opportunity to litigate the claim that it raised under § 605. As such, we conclude that Time Warner has satisfied this final element for issue preclusion.

In sum, we agree with the district court that the second element ("necessary to the outcome") set forth in *Smith v. SEC*, 129 F.3d 356, 362 (6th Cir.1997) (en banc), has not been met, but disagree that the fourth element ("full and fair opportunity to litigate") was lacking. But because all four

elements of *Smith* must be satisfied before the prior opinion will be given preclusive effect, NSS is not bound by the decision in *Coach's Corner*. We therefore turn to the issues of whether NSS has standing to sue under § 605 of the Communications Act and whether it has sufficiently established a claim against Time Warner for a violation of that Act.

C. NSS has standing to sue Time Warner because the definition of a "person aggrieved" in § 605(d)(6) is nonexclusive

Congress enacted the Cable Communications Policy Act of 1984 to address "a problem which is increasingly plaguing the cable industry — the theft of cable service." H.R.Rep. No. 98-934, at 83 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4720. This statute amended and supplemented the Communications Act. *See id.* The 1984 legislation added subsections (b)-(e) to § 605. These new provisions were intended to address "the growing practice of individuals taking down satellite delivered programming for private, home viewing by means of privately owned backyard earth stations." *See* 1984 U.S.C.C.A.N. at 4745. The original prohibitions contained in § 605, however, were retained without amendment in what is now codified at § 605(a).

Section 605(a), therefore, lists the types of unauthorized publication or use of electronic communications that have been prohibited since the Communications Act first became law. It sets forth separate prohibitions in each sentence. The first sentence states:

> [N]o person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of

> transmission or reception . . . to any person other than the addressee, his agent, or attorney. . . .

47 U.S.C. § 605(a). The second sentence of § 605(a) prohibits piracy as is it traditionally understood:

> No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.

Id. Finally, the third sentence provides:

> No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.

Id.

Congress has criminalized the unauthorized interception of communications prohibited by § 605(a). *See* 47 U.S.C. § 605(e)(1). Subsection (e) also provides for private civil enforcement of § 605 as now amended. *See* 47 U.S.C. § 605(e)(3)(A) ("Any person aggrieved by any violation of subsection (a) of this section . . . may bring a civil action in a United States district court or in any other court of competent jurisdiction."). As a result, § 605 sets forth both civil and criminal penalties for its violation. *See* 47 U.S.C. § 605(e). Furthermore, § 605(e) designates varying penalties, depending on whether or not a violation of the section was willful. The term "person aggrieved" was not defined when § 605(e)(3)(A) was originally enacted.

Section 605 of the Communications Act was further amended by the Satellite Home Viewer Act of 1988, Pub.L. No. 100-667, § 205, 102 Stat. 3959-60. That Act amended

§ 605 by adding the following definition of a "person aggrieved" to § 605(d):

> (d) Definitions
>
> For purposes of this section —. . .
>
> (6) the term "any person aggrieved" shall include any person with proprietary rights in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite cable programming. . . .

47 U.S.C. § 605(d)(6). The Communications Act elsewhere defines a "communication by wire" as a "transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection," 47 U.S.C. § 153(a), and a "communication by radio" as a "transmission by radio of writing, signs, signals, pictures, and sounds of all kinds," 47 U.S.C. § 153(b).

Time Warner contends that Congress would not have amended § 605 to add the definition of "any person aggrieved" if it had intended to grant broad standing to anyone potentially injured by the statute. Rather, Time Warner argues that Congress intended to *limit* standing to sue under § 605 to those who meet the definition of a "person aggrieved" under § 605(d)(6). As a result, Time Warner claims that the district court erred in concluding that NSS had standing to sue under § 605.

The district court held that the use of the word "include" in the statutory phrase "any person aggrieved shall *include* any person . . ." does not mean that *only* persons who meet that definition have standing to sue. We agree. The district court's interpretation is consistent with the legislative history of § 605(d). In the House Report accompanying the 1988 amendment to § 605 that added the definition of "person

aggrieved" under § 605(d)(6), the purpose of the amendment was explained as follows:

> Section 5 of [the Satellite Home Viewer Act of 1988] amends [§ 605] of the Communications Act pertaining to the piracy of satellite cable programming. The Committee's amendment is intended to deter piracy practices by (1) stiffening applicable civil and criminal penalties, (2) *expanding standing to sue*, and (3) making the manufacture, sale, modification . . . of devices or equipment with knowledge that its primary purpose is to assist in unauthorized decryption of satellite cable programming expressly actionable as a criminal act.

H.R.Rep. No. 100-877(II), at 28, *reprinted in* 1988 U.S.C.C.A.N. 5638, 5657 (emphasis added).

Limiting the availability of civil actions to those persons who meet the definition of a "person aggrieved" in § 605(d)(6), and requiring that they have "proprietary rights in [an] intercepted communication," is inconsistent with the intent of Congress as expressed in the Cable Communications Policy Act of 1984 and the Satellite Home Viewer Act in 1988. Both acts were intended to expand the scope of protection provided by the Communications Act, not limit it. In particular, Time Warner's argument flies in the face of Congress's explicit interest in "expanding standing to sue" under the Act. By adding satellite communications under the protection of § 605, along with wire and radio communications, Congress sought to make clear that those with "proprietary rights in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite cable programming," 47 U.S.C. § 605(d)(6), have standing to sue.

But this explicit reference to a subset of persons aggrieved was not intended to exclude others who sustain injuries from a violation of any of the prohibitions originally listed in

§ 605(a). In particular, the prohibition in the first sentence of § 605(a) does not involve the interception of a communication at all. It prohibits intermediaries who are *authorized* to receive a communication by wire or radio from divulging the contents of the transmission to any person other than the addressee intended by the sender.

Our circuit has previously recognized Congress's intent to expand rather than contract the reach of the Communications Act when it amended § 605:

> In view of [promoting the growth of satellite programming and facilitating individual reception of unencrypted satellite signals], Congress amended the Communications Act to authorize the receipt of unscrambled satellite programming for private viewing[, w]hile *leaving intact the prohibitions against unauthorized use of radio or wire communications contained in 47 U.S.C. § 605(a).*

Loschiavo v. City of Dearborn, 33 F.3d 548, 551 (6th Cir. 1994) (emphasis added). Time Warner, however, argues that § 605 "is violated only when a person both intercepts and divulges a communication," citing *Smith v. Cincinnati Post & Times-Star*, 475 F.2d 740 (6th Cir.1973), and *Bufalino v. Michigan Bell Telephone Co.*, 404 F.2d 1023 (6th Cir.1968). The district court acknowledged these older precedents in a footnote, but distinguished them on the basis that they were both decided before the 1984 and 1988 amendments to the Communications Act. Both cases are also distinguishable on their facts.

Smith, for example, involved an employee of the Domestic Relations Court in Hamilton County, Ohio who had a telephone conversation with Howard Wunker, a private citizen. The court employee told Wunker that he could arrange a "fix" in a divorce case pending in that court. Wunker recorded this conversation and released the recording to the local

newspaper, which published the contents of the Smith Wunker conversation. *See Smith*, 475 F.2d at 740-41. Smith sued both the newspaper and Wunker. The decision in *Smith*, a two-page per curiam opinion, primarily discusses Smith's claim under the Federal Wiretap Law, 18 U.S.C. § 2520, which it found inapplicable. It then summarily concluded that Smith's claim under § 605 must also be dismissed, "since that section is violated only when a person both intercepts and divulges a communication, which is not the case in regard to this defendant." *Id.* at 741 (citing *Bufalino*, 404 F.2d at 1027).

Because Wunker was the intended addressee/recipient of Smith's telephone conversation and no "interception" of a communication was involved, § 605 was not implicated by the fact situation in *Smith*. As such, the broad statement in *Smith* to the effect that § 605 requires both an interception and divulgence of a communication is dicta, because it was not necessary for the disposition of that case. *See Coca-Cola Co. v. Procter & Gamble Co.*, 822 F.2d 28, 30 (6th Cir.1987) (holding that a prior case's sweeping language regarding a section of the Lanham Act was not binding where it only addressed a narrow issue thereunder and failed to address other issues arising within the same section).

Bufalino is also distinguishable. In that case, William Bufalino was a residential customer of a Michigan telephone company. Two company linemen were working on a telephone pole to transfer lines in a cable box. Because one of the servicemen had incomplete information, he tried to call the office by connecting to an unknown line in the cable box. In actuality, he called Bufalino's residence. Bufalino then sued the Michigan telephone company, alleging that its workers had illegally tapped into his home telephone line in violation of § 605. His complaint specifically alleged a violation of the second sentence of § 605 only, which is now the

second sentence of § 605(a) as a result of the amendments contained in the Cable Communications Policy Act of 1984. According to that sentence, "[n]o person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." 47 U.S.C. § 605(a).

This court affirmed the dismissal of Bufalino's complaint, concluding that there was no intercepted communication involved. *Bufalino*, 404 F.2d at 1027. Consequently, *Bufalino*'s statement that "[i]n order to constitute a violation of Section 605 there must be both an interception and a divulgence," *id.*, though worded expansively, is properly confined to an interpretation of the second sentence of § 605(a). The statements from *Smith* and *Bufalino* that purportedly limit the scope of § 605 are thus overly broad, taken out of context, and therefore not definitive in determining the applicability of § 605 to the present circumstances. *See Coca-Cola*, 822 F.2d at 30.

In conclusion, we find no merit in Time Warner's argument that NSS does not have standing to sue under § 605. We agree with the district court that the plain language of the word "include" in § 605(d)(6) does not render the definition of a "person aggrieved" an exclusive one. Furthermore, the legislative history of the amendments to the Communications Act in 1984 and 1988 reveals that Congress intended to bring cable and satellite communications under the protection of that Act by expanding, not limiting, the group of persons who have standing to sue for its violation. Consequently, we hold that the definition of a "person aggrieved" in § 605(d)(6) is nonexclusive, and that the district court did not err in determining that NSS had standing to sue Time Warner under § 605.

D. Time Warner violated the first sentence of § 605(a)

Time Warner next argues that the district court erred in holding Time Warner liable for violating § 605(a). First, it contends that an interception is required to state a claim for a violation under that section. Second, it maintains that it is not liable under either the first or third sentences of § 605(a), even if an interception is not a required element of the violation.

To start with, Time Warner argues that NSS had no proprietary right in the telecast that Time Warner was distributing. Essentially, according to Time Warner, an electronic *transmission* can be severed from the *content* of the material that is being transmitted. To support the view that § 605 only protects the physical means of a transmission and not its content, Time Warner cites *Goldman v. United States*, 316 U.S. 129, 134, 62 S.Ct. 993, 86 L.Ed. 1322 (1942), *overruled on other grounds by Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The Court in *Goldman* stated that "[t]he protection intended and afforded by the [original Communications Act] is of the *means of communication.*" 316 U.S. at 133, 62 S.Ct. 993 (emphasis added).

But Goldman actually supports the conclusion that the Communications Act was designed to protect the content of a transmission as well. In that case, federal agents used non-electronic eavesdropping instruments to listen to conversations in an enclosed room by persons who were eventually indicted for conspiracy to violate the Bankruptcy Act. *See id.* at 130-31, 62 S.Ct. 993. One of those defendants argued that the federal agents had violated the Communications Act by overhearing and divulging the contents of what he said while on the telephone. Holding that such overhearing and divulging was not a violation of § 605, the Court stated:

> What is protected is the message itself throughout the course of its transmission by the instrumentality or agency of transmission. Words written by a person and intended ultimately to be carried as so written to a telegraph office do not constitute a communication within the terms of the Act until they are handed to an agent of the telegraph company.

Id. at 133, 62 S.Ct. 993.

The above passage underscores the protection provided by § 605 to the message's content once it is in the pipeline of an electronic transmission. That § 605 protects both the transmission and its contents is consistent with the statutory definition of a "communication." *See, e.g.*, 47 U.S.C. § 153(a) (stating that a "communication by wire" is a "transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection.").

Both NSS and Time Warner had contracted with distributors authorized by Main Events for the right to obtain a transmission of the event on the night of December 16, 1996. The difference between their rights was that NSS contracted for the right to distribute the communication to commercial establishments, while Time Warner obtained the right to relay the communication to residential customers. As such, both parties had proprietary interests in the *transmission* of the *content* of the boxing match, regardless of the satellite transfers or encryptions that the transmissions underwent in the process.

Given that NSS had a proprietary interest in the transmission of the event, the next question is whether Time Warner "intercepted" that communication. We conclude that it did not. The Supreme Court has defined an interception for the purposes of § 605 to be a "taking or seizure by the way or before arrival at the destined place." *Goldman*, 316 U.S. at

134, 62 S.Ct. 993. Under this definition, Time Warner did not intercept the communication at issue. Rather, it simply redirected the authorized transmission of the event to its subscribers who ordered the program, including one, the Melody Lane Lounge, that was incorrectly listed as a residential customer.

But the absence of an "interception" does not get Time Warner off the hook of § 605. As previously explained, Time Warner's reliance on *Smith v. Cincinnati Post & Times-Star*, 475 F.2d 740 (6th Cir.1973), and *Bufalino v. Michigan Bell Telephone Co.*, 404 F.2d 1023 (6th Cir.1968), is misplaced. Similarly, Time Warner's citation to *Cablevision of Michigan, Inc. v. Sports Palace, Inc.*, No. 93-1737, 1994 WL 245584 (6th Cir. June 6, 1994) (unpublished table decision), is unavailing. In *Cablevision*, a distributor with exclusive rights to broadcast a boxing match to commercial establishments sued a sports bar under § 605 that had improperly obtained the boxing match from a residential pay-per-view service. *Cablevision* cited *Smith* for the proposition that when "there [is] no interception, the mere fact that the bar divulged or published [a similar boxing match] cannot make it liable under Section 605(a)." *See id.* at *4 (citing *Smith*, 475 F.2d at 741) (original alterations and internal quotation marks omitted).

For the reasons previously discussed, however, this proposition is not a correct statement of the law. *Smith*'s holding is limited to an interpretation of the second sentence of § 605(a), not the entire provision. As a result, *Cablevision*'s reliance on the broad dicta from *Smith* is misplaced. Because *Cablevision* is an unpublished decision, we are not bound by its holding. *See McCloud v. Testa*, 97 F.3d 1536, 1559 n. 36 (6th Cir.1996).

We are bound, however, to properly apply the first sentence of § 605(a). An authorized intermediary of a communication (such as Time Warner) violates the first sentence of § 605(a) when it divulges that communication through an electronic channel to one "other than the addressee" intended by the sender (such as Main Events). Time Warner responds by arguing that at all times it was transmitting the event through fully authorized channels. But this is incorrect, because Time Warner was not authorized to transmit the event to commercial establishments.

When viewed in this light, we conclude that the district court did not err in holding that Time Warner violated the first sentence of § 605(a). The district court found that Time Warner had improperly divulged the communication of the event to the Melody Lane Lounge, an "addressee" that was not authorized by Main Events to receive it from Time Warner. This conclusion finds support from the case of *That's Entertainment, Inc. v. J.P.T., Inc.*, 843 F.Supp. 995 (D.Md.1993). That court, faced with a similar fact pattern to the one in *Cablevision*, held that

> [e]ven assuming, as these defendants contend, that there was no "interception" here because [the bar] was "authorized" by [the residential distributor] to receive the Event on a pay-per-view basis, defendants still have violated the Act because they clearly were not authorized to then broadcast the Event to the patrons of a commercial establishment such as [the bar]. . . . [T]he first and third sentences of [§ 605(a)] do not . . . require an "interception" of a cable transmission and clearly proscribe the unauthorized divulgence or use of communications which have been "received" legally for certain purposes.

Id. at 999.

A similar conclusion was reached in the unreported case of *Joe Hands Promotions v. D.M.B. Ventures, Inc.*, Nos. CIV. A 93-2656, CIV. A. 93-3141, 1995 WL 328399 (E.D.La. May 31, 1995) (unpublished table decision). In *Joe Hands Promotions*, Cox Cable had the exclusive right to distribute a boxing match to its residential customers via pay-per-view programming, while Joe Hand Promotions had the exclusive right to distribute the event to commercial establishments. Just as NSS has sued Time Warner in the case before us, Joe Hand Promotions sued Cox Cable for providing the broadcast of the event to several commercial establishments that were erroneously receiving residential service from Cox Cable. *See id.* at *2. That court held as follows:

> It is undisputed that Cox Cable received the pay-per-view event satellite signal, divulged the satellite signal via co-axial cable to three commercial establishments not authorized to receive the event, and that it received payment from the restaurants. These facts are sufficient to impose liability under the first and third sentences of Section 605(a).

Id. at *6.

We thus conclude that even though Time Warner did not intercept the communication in question, it nonetheless divulged the telecast of the event to an unauthorized addressee in violation of the first sentence of § 605(a). Time Warner, however, makes a compelling argument that it did not violate the third sentence of § 605(a). According to that sentence, "*[n]o person not being entitled thereto* shall receive or assist in receiving any interstate or foreign communication by radio and use such communication . . . for his own benefit or for the benefit of another not entitled thereto." 47 U.S.C. § 605(a) (emphasis added).

We read the clause "no person not being entitled thereto" as referring to persons who were never authorized to receive the communication in question. Unlike the first sentence of § 605(a), which looks at the relationship between the original sender and the ultimate receiver in determining whether the communication is authorized, the third sentence only applies to persons who were never authorized to be in possession of the communication in the first place.

Time Warner does not fit within this definition, because it was contractually authorized to receive the communication of the event at its head end in Akron and to further relay that communication to its residential customers in the area. We therefore cannot agree with the district court that Time Warner violated the prohibition enunciated in the third sentence of § 605(a). Nonetheless, Time Warner is unable to escape liability under the first sentence of § 605(a) for divulging the communication that it was authorized to distribute on a limited basis only, when one of the recipients of that transmission was an unauthorized addressee of Main Events, the sender.

Although Time Warner protests that this outcome results in a federal mandate of infallibility on the part of cable operators, we believe that Congress enacted the Communications Act and the subsequent amendments thereto to protect the integrity of electronic communications from negligent as well as willful divulgences by intermediaries. Section 605(e), for example, distinguishes between willful and nonwillful divulgences in the setting of statutory damages. Both NSS and Time Warner were such intermediaries in the transmission of the event in question, and were only authorized to partake in the transmission insofar as their respective transmission rights authorized them to do so. Because the Melody Lane Lounge was not authorized by Main Events to receive the transmission

of the event from Time Warner, Time Warner has violated the prohibitions of the first sentence of § 605(a).

E. The district court's findings of statutory damages, attorney fees, and costs were not clearly erroneous

Finally, Time Warner challenges the district court's award of $4,500 in statutory damages to NSS and its order for Time Warner to pay NSS's attorney fees and costs in the sum of $26,389.65. It argues that the amount of damages was disproportionate, especially in light of what NSS's measure of damages would have been under state contract law. The district court held a hearing in order to assess NSS's damages and issued two separate memorandum opinions on this issue. It first determined the amount of damages according to its authority under 47 U.S.C. § 605(e)(3)(C)(i)(II), and explained its award in an eight-page opinion dated December 19, 1999. It then calculated the award for attorney fees and costs under 47 U.S.C. § 605(e)(3)(B)(iii), setting forth its reasoning in a four-page opinion dated March 23, 2000.

Time Warner's basic argument is that the award is grossly disproportionate to any harm suffered by NSS. The district court, however, provided a detailed account of its findings of fact and conclusions of law with regard to the calculation of damages. Significantly, it found that Time Warner did not willfully violate the statute, and therefore the court did not impose any of the additional penalties provided by the statute for such a violation. *See, e.g.*, 47 U.S.C. § 605(e)(3)(C)(ii) (granting courts the discretion to increase an award of damages by an amount of not more than $100,000 for each violation of subsection (a) if the violation is willful).

According to § 605(e)(3)(C)(i)(II), a party aggrieved by a nonwillful violation of § 605 may recover damages of not less than $1,000 or more than $10,000 "as the court considers just." The district court found that NSS would have received

almost $1,000 if the Melody Lane Lounge had purchased the event from NSS. It further recognized that NSS paid $1,785 to investigate compliance in the Akron area with NSS's transmission rights to broadcast the event on the night in question. NSS also presented proof that it incurred approximately $1,700 in administrative costs that were necessary to identify Time Warner as the source of the Melody Lane Lounge's transmission of the event, even though this figure was not mentioned in the district court's formal findings of fact. Although the district court did not specify precisely how it arrived at the final figure of $4,500, we conclude that the proof supports the damage calculation, that the amount is well within the statutory range, and that the award is not clearly erroneous.

We also find no error in the district court's award of attorney fees and costs to NSS. Time Warner did not dispute the hourly rate charged by NSS's attorneys as unreasonable. In addition, the district court disallowed the cumulative hours charged by a second NSS attorney that it felt should not be imposed on Time Warner. We therefore find no basis to set aside the award of attorney fees and costs to NSS.

III. CONCLUSION

In conclusion, we hold that NSS is not precluded from bringing this action against Time Warner, that NSS has standing to sue, and that NSS has established Time Warner's violation of the first sentence of 47 U.S.C. § 605(a). For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 5:97CV3096

NATIONAL SATELLITE SPORTS, INC.,
Plaintiff,

v.

ELIADIS, INC., ET AL.,
Defendants.

[July 30, 1999]

MEMORANDUM OPINION

DOWD, District Judge.

Before the Court are the parties' cross-motions for summary judgment (Doc. Nos. 37 and 38). For the reasons stated below, the Court finds that defendant's motion for summary judgment (Doc. No. 38) should be denied and that plaintiff's motion for summary judgment (Doc. No. 37) should be granted in part and denied in part.

I. BACKGROUND

Plaintiff National Satellite Sports, Inc., brought this case under 47 U.S.C. § 605, alleging a violation of that statute by defendant, Time Warner Entertainment Co. Plaintiff had the exclusive license to transmit the December 14, 1996, "Bowe-Galota Boxing Match" ("the Event") to commercial

establishments.[1] Plaintiff alleges that, while defendant had the authority to transmit the Event to residential customers, defendant did not have the right to transmit it to commercial customers. It is undisputed that defendant received the Event signal from a satellite, transmitted the Event to a commercial customer, the Melody Lane Lounge,[2] and charged the customer a residential rate for the transmission. Defendant claims that, at the time of the transmission, and unknown to defendant, the Melody Lane Lounge was improperly listed in defendant's records as being a residential customer.

Plaintiff seeks statutory damages in the amount of $7,700 under § 605(e)(3)(C)(i)(II) as the remedy for the loss of "the revenue which would have been derived from the delivery and exhibition of the Event to 'Melody Lane Lounge' and its patrons." It also seeks attorney fees and costs pursuant to § 605(e)(3)(B)(iii). Additionally, plaintiff seeks statutory damages in the amount of $23,200 pursuant to § 605(e)(3)(C)(ii) as a discretionary increase due to the alleged willfulness of defendant's actions.[3] Defendant asserts

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[1] Defendant, in its "Supplemental Brief" on the issue of summary judgment, filed on February 12, 1999, raises an objection to plaintiff's alleged failure to provide evidence in support of plaintiff's claim that it had the exclusive right to transmit the Event to commercial establishments in Ohio. Defendant will not be heard to complain of this alleged failure at this late date, in light of its earlier admission of that very assertion on the first page of its "Memorandum in Opposition to Plaintiff's Request to Disclose Discovery" (Doc. No. 30).

[2] The Melody Lane Lounge was originally a named defendant in this case, but was termed from the lawsuit on June 9, 1998 (Docket No. 21).

[3] Plaintiff has modified its damage claims somewhat. Plaintiff originally stated, in the Complaint, that it sought $10,000 in statutory damages pursuant to 47 U.S.C. § 605(e)(3)(C)(i)(II), $100,000 in statutory damages pursuant to 47 U.S.C. § 605(e)(3)(C)(ii), full costs of the action (including attorney fees), and any other relief this Court were to deem just and proper.

that plaintiff has failed to state a claim under the statute, that plaintiff is not an "aggrieved person" within the meaning of the statute, that plaintiff's arguments are collaterally estopped, and that its actions were not willful.

II. SUMMARY JUDGMENT

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. When a court considers a motion for summary judgment, "the inferences to be drawn from the underlying facts contained in [affidavits, pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion." *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). However, the adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The Rule requires the nonmoving party who has the burden of proof at trial to oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves[.]" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). General averments or conclusory allegations of an affidavit do not create specific fact disputes for summary judgment purposes. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). Nor may a party "create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts . . . earlier deposition testimony." *Reid v. Sears Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir.1986) (citing *Biechele v. Cedar Point, Inc.*, 747 F.2d

209, 215 (6th Cir.1984)). Further, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir.1989) (quoting *Anderson v. Liberty Lobby*, 477 U.S. at 252, 106 S.Ct. 2505).

In sum, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby*, 477 U.S. at 250, 106 S.Ct. 2505.

III. LAW

The applicable statute, 47 U.S.C. § 605, provides, in pertinent part:

> **(a) Practices prohibited**
>
> Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio

communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is transmitted by any station for the use of the general public, which relates to ships, aircraft, vehicles, or persons in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator.

Additionally, the statute discusses the available damages:

[(e)(3)] (C)(i) Damages awarded by any court under this section shall be computed, at the election of the aggrieved party, in accordance with either of the following subclauses;

(I) the party aggrieved may recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in

> computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or
>
> **(II)** the party aggrieved may recover an award of statutory damages for each violation of subsection (a) of this section involved in the action in a sum of not less than $1,000 or more than $10,000, as the court considers just, ...
>
> **(ii)** In any case in which the court finds that the violation was committed willfully and for purposes of direct or indirect commercial advantage or private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory, by an amount of not more than $100,000 for each violation of subsection (a) of this section.

Satellite signals constitute "radio" signals for purposes of this statute. *See U.S. v. One Macom Video Cipher II, SN A6J050073*, 985 F.2d 258, 260 (6th Cir.1993).

IV. THE PARTIES' POSITIONS

Defendant argues that it is entitled to summary judgment because: (1) the doctrine of collateral estoppel precludes plaintiff from litigating, in this case, the issue of whether it has a protected interest for which relief can be granted under § 605;[4] (2) plaintiff is not an "aggrieved" person within the meaning of § 605 and, therefore, cannot succeed in this

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[4] According to defendant, this same legal issue was decided in defendant's favor in another case in the Northern District in which the facts and legal issues were "identical."

action; and (3) plaintiff cannot demonstrate that defendant "intercepted" the signal of the Event, and interception is a required element of a violation of § 605.

Plaintiff, on the other hand, argues that it is entitled to summary judgment because: (1) defendant has admitted facts that constitute a willful violation of § 605; and (2) plaintiff is an "aggrieved" person within the meaning of § 605. It also asserts that it is entitled to $30,800 in damages plus costs and attorney fees as a matter of law.

V. DISCUSSION

For the reasons contained in the following discussion, this Court finds that plaintiff's claim is not barred by the doctrine of collateral estoppel; that plaintiff is an aggrieved person within the meaning of § 605; that defendant's conduct violated § 605; and that the determination of the amount of damages, including whether plaintiff is entitled to additional damages for willfulness, must be left for the trier of fact. These conclusions necessarily mean that defendant will be liable for some amount in damages to plaintiff for its violation of § 605 and will be ordered to pay plaintiff's full costs, including reasonable attorney fees. *See* 47 U.S.C. § 605(e)(3)(B)(iii).

A. COLLATERAL ESTOPPEL

Defendant's assertion the plaintiff's claim is collaterally estopped by a prior determination in another case is not well-taken. Two of the requirements for the application of collateral estoppel, as conceded by defendant, are that there must have been a full and fair opportunity to litigate the issue and that determination of the issue in question must have been necessary of essential to the judgment in the prior action. *See Smith v. Sushka*, 117 F.3d 965, 973 (6th Cir.1997) (citing *Goodson v. McDonough Power Equipment, Inc.* (1983), 2 Ohio St.3d 193, 443 N.E.2d 978). Defendant asserts that the

issue of "satellite piracy" was "plainly necessary to the final judgment" in a prior case captioned *National Satellite Sports, Inc. v. Lynstalder, Inc.*, No. 5:97CV2039 (N.D.Ohio). Therefore, according to defendant, the "essential to the judgment" requirement is satisfied. This does not follow, however. Defendant does not (and, in fact, could not) argue that the general issue of "satellite piracy" is the issue collaterally estopped. Rather, defendant is arguing that, in the prior case, the court determined that National Satellite had no "proprietary interest" in a signal received and sent (allegedly inadvertently) by Time Warner to a commercial establishment, because it was physically distinct from the signal that National Satellite received and then sent to its contractually-authorized, commercial-establishment recipients. This is the issue that defendant claims is collaterally estopped.

Defendant has not demonstrated, as it must, that the determination of this particular issue was essential to the judgment in Lynstalder, supra. The court in that case first concluded, at the summary judgment stage, that National Satellite had failed to state a claim because it had entered into a contract, the terms of which specifically provided that National Satellite had no right to pursue a piracy action. Lynstalder, supra, Transcript of Oral Hearing on Defendant's Motion for Summary Judgment, July 13, 1998, 35-39 (Defendant's Motion for Summary Judgment, Exh. 5). The court further held that, "[e]ven considering [parol evidence purporting to negate that contractual provision]," National Satellite had failed to state a claim under § 605 because it had no proprietary interest in the allegedly intercepted communication — that is, the signal sent by the entity authorized to send it to residential customers only. *Id.* This second basis for the holding was not essential to the judgment, since, in the court's view, the contractual language clearly barred the action.

Regarding the alleged "full and fair opportunity to litigate" this issue, defendant states, simply, that:

> A final judgment was rendered on the merits in the previous case after a full and fair opportunity to litigate. The case was decided on summary judgment after the litigants presented in Court their motions and evidence.

Defendant points to nothing in the record to support this conclusion. This hardly satisfies defendant's burden of demonstrating to the Court that there was such a "full and fair opportunity to litigate" the issue of whether National Satellite had a proprietary interest in the signal allegedly intercepted. Defendant has failed to demonstrate that this issue is collaterally estopped.

B. "AGGRIEVED" PERSON

Regarding the definition of an "aggrieved" person for purposes of § 605, the Court notes that the statute provides that "the term 'any person aggrieved' shall *include* any person with proprietary rights in the intercepted communication . . ." See 47 U.S.C. § 605(d) (emphasis added). It does not state that *only* such persons are "aggrieved" for purposes of § 605. One need only look to the second part of this subsection to realize that the word "include" renders the subsequent words non-limiting:

> [I]n the case of a violation of paragraph (4) of subsection (e) of this section, [the term 'any person aggrieved'] shall also include any person engaged in the lawful manufacture, distribution, or sale of equipment necessary to authorize or receive satellite cable programming.

Paragraph (4) of subsection (e) provides that:

> Any person who manufactures, assembles, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to

> know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services, or is intended for any other activity prohibited by subsection (a) of this section, shall be fined not more than $500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both. For purposes of all penalties and remedies established for violations of this paragraph, the prohibited activity established herein as it applies to each device shall be deemed a separate violation.

No one could seriously argue that persons who are engaged solely in the *unlawful* manufacture or distribution of such equipment are thereby automatically immune from liability under § 605(e)(4). It stands to reason, therefore, that persons other than those with "proprietary rights in the intercepted communication" may also be able to state a claim under § 605.[5]

C. VIOLATION OF § 605

Plaintiff argues that defendant violated the first and third sentences of § 605(a). Defendant argues that it did not "intercept" a signal in which plaintiff had an interest and, therefore, cannot be held liable under § 605(a). There can, however, be a violation of § 605(a) in the context of a cable television communication even if the violator receives a communication signal that it is legally entitled to receive, if it

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[5] Furthermore, with all due respect to the *Lynstalder* court, this Court is not convinced that National Satellite did not have a proprietary interest in the communication of the Event sent by defendant to Melody Lane Lounge. For example, one might argue that, since plaintiff had the exclusive right to send the Event signal to commercial establishments, a proprietary interest of some sort on the part of plaintiff arose at the moment when defendant transmitted the Event to Melody Lane Lounge.

then diverts or sends the communication to an entity that is not entitled to the communication.[6] The first sentence of § 605(a) provides:

> Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his

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[6] This Court is not unaware of holdings by the Sixth Circuit that a violation of § 605 requires *both* an interception and a divulgence of a protected communication, and that one authorized to receive the communication cannot have "intercepted" it. *See Smith v. Cincinnati Post & Times-Star*, 475 F.2d 740, 741 (6th Cir.1973), and *Bufalino v. Michigan Bell Telephone Co.*, 404 F.2d 1023, 1027 (6th Cir.1968). Those cases, however, were decided before cable television became the subject of § 605 litigation and involved the issue of whether a party to a telephone conversation can be liable under § 605 if that party divulges the contents of the conversation to another. This Court holds that those cases are easily distinguishable from the one at bar and do not necessarily require a decision in defendant's favor simply because the defendant did not physically receive an unauthorized signal, or because the physical signal sent by plaintiff was not the one received by Melody Lane Lounge. *See also Kingvision Pay Per View, Ltd. v. Williams* and *That's Entertainment, Inc. v. J.P.T., Inc., infra.* This Court also notes that other courts bound by Sixth Circuit law have more recently held, in similar cable piracy cases, that § 605 can be violated by *either* an interception *or* a divulgence of a protected communication. *See, e.g., United States v. Westbrook*, 502 F.Supp. 588, 589 (E.D.Mich.1980); *Cox Cable Cleveland Area, Inc. v. King*, 582 F.Supp. 376, 379 (N.D.Ohio 1983). Finally, it has been suggested that one authorized to receive a cable television signal at one destination might be said to "intercept" it by diverting it to an unauthorized destination. *See Kingvision Pay Per View, Ltd. v. Duermeier*, 24 F.Supp.2d 1179, 1185 n. 3 (D.Kan.1998). Here, defendant was authorized to receive the signal and send it to residential customers, but then "diverted" it to Melody Lane Lounge, an unauthorized destination.

> agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority.

This section has been interpreted as designed specifically to regulate the conduct of legitimate communications personnel with respect to the divulgence or publication of wire or radio transmissions. *See, e.g., Kingvision Pay Per View, Ltd. v. Duermeier*, 24 F.Supp.2d 1179, 1183 (D.Kan.1998); *Joe Hand Promotions, Inc. v. Rennard Street Enterprises, Inc.*, 954 F.Supp. 1046, 1052 (E.D.Pa.1997); *International Cablevision, Inc. v. Sykes*, 75 F.3d 123, at 131 n. 4 (2d Cir.1996); *National Basketball Assoc. v. Sports Team Analysis and Tracking Systems, Inc.*, 939 F.Supp. 1071, 1113 (S.D.N.Y.1996); *United States v. Norris*, 88 F.3d 462, 465 (7th Cir.1996); and *International Cablevision, Inc. v. Noel*, 859 F.Supp. 69, 75 (W.D.N.Y.1994). Defendant transmitted the Event to Melody Lane Lounge through an unauthorized channel of transmission (defendant was not authorized to transmit the Event to commercial establishments). Defendant also assisted Melody Lane Lounge in receiving the Event through an unauthorized channel of reception (Melody Lane Lounge was not authorized to receive the Event except by contract with plaintiff).

The third sentence of § 605(a) provides:

> No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.

Defendant assisted in the receiving of the Event by Melody Lane Lounge. No one disputes that defendant was "not entitled" to assist Melody Lane Lounge in that reception, or that Melody Lane Lounge was "not entitled" to that reception. Other courts have found commercial establishments to have violated the above provision of § 605 under similar circumstances. *See, e.g., Kingvision Pay Per View, Ltd. v. Williams*, 1 F.Supp.2d 1481 (S.D.Ga.1998) (commercial establishment that received a boxing match at the residential rate from satellite service provider and exhibited the match to its patrons, held liable under § 605 to owner of exclusive rights to distribute the match to commercial establishments, even if the establishment did not "illegally intercept[]" the signal); *That's Entertainment, Inc. v. J.P.T., Inc.*, 843 F.Supp. 995 (D.Md.1993) (commercial establishment that diverted a cable signal of a boxing match from a residence to its business premises and exhibited the match to its patrons, held liable under § 605 to owner of exclusive rights to distribute the match to commercial establishments, whether or not there was an actual "interception" of the boxing match signal; court, however, concluded that there was an "interception" within the meaning of § 605 under the facts of the case). Defendant's assistance in the reception of the signal by Melody Lane Lounge, therefore, was also a violation of § 605. Furthermore, plaintiff suffered harm as a direct result of that violation. *See Kingvision Pay Per View, Ltd. v. Williams* and *That's Entertainment, Inc. v. J.P.T., Inc., supra.* The Court concludes, therefore, that defendant violated § 605 and is liable to plaintiff for damages, attorney fees, and costs. The amount of damages, however, cannot be determined as a matter of law at this stage because there are material fact issues that affect the amount of damages, including what support there is for the amount of statutory damages plaintiff is demanding and whether defendant's actions were willful.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment (Doc. No. 38) is DENIED and plaintiff's motion for summary judgment (Doc. No. 37) is GRANTED in part as to the issue of liability. The case will proceed toward trial on the issues relating to damages.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 5:97CV3096

NATIONAL SATELLITE SPORTS, INC.,
Plaintiff,

v.

ELIADIS, INC., ET AL.,
Defendants.

[December 13, 1999]

MEMORANDUM OPINION

Plaintiff National Satellite Sports, Inc. ("National") brought this case under 47 U.S.C. § 605 alleging a violation of the statute by defendants Time Warner Entertainment Co. ("TWE") and Melody Lane Lounge ("MLL"), a commercial establishment in Perry, Ohio. Plaintiff had the exclusive license to transmit the December 14, 1996 "Bowe-Golota Boxing Match" (the "Event") to commercial establishments; defendant had the authority to transmit to residential customers. Through TWE, the Melody Lane Lounge received a signal for the Event and played the Event for its patrons on December 14, 1996. The Melody Lane Lounge has since settled with plaintiff but TWE remained in the suit. This Court previously determined through summary judgment that National is entitled to an award of damages against TWE pursuant to 42 U.S.C. § 605 ("Piracy Act"); familiarity with this ruling is assumed. National has elected to receive

statutory, rather than actual, damages and has requested enhancement of those damages by the statutory multiplier. National also seeks a full award of its attorney fees and costs in pursuing this claim; but this issue was deferred until after trial.

Plaintiff seeks statutory damages pursuant to 47 U.S.C. § 605(e)(3)(C)(i)(II) as well as enhanced damages for willfulness under § 605(e)(3)(C)(ii). Plaintiff estimated its approximate statutory damages as follows: $987.50 in lost profits; $1,700 for expenses in investigating and policing piracy in Northeast Ohio; $1,700 in administrative fees necessary to identify defendants as pirates; $5,000 in lost goodwill of customers.

Findings of Fact

1.) TWE's carriage agreement provides: "Affiliate shall not authorize or permit the exhibition of the channels in non-residential establishments . . . [including] commercial establishments such as restaurants and bars." TWE was and has always been prohibited from providing pay-per-view access to commercial establishments under the terms of its carriage agreement.

2.) On or about February 7, 1996, a TWE employee, Ken Sovacool (since terminated by TWE), submitted a work order to TWE for an upgrade in cable service on Account No. 4613-05 [hereinafter referred to as "The Account"], which served Melody Lane Lounge, located at 4329 Lincoln Way E., Massillon, Ohio, and which at the time was listed on the work order in the name of Gust Eliadis.

3.) MLL was housed in a single story, stand alone brick structure, sporting a large plate glass window with neon beer signs in the window, along with a large exterior sign. It is obvious MLL is a commercial establishment.

4.) Through the front entrance, situated in the center of MLL, there is a large, circular bar, with 30 stools arranged around it. One television set was located above the bar and one above the booths in the rear of the bar.

5.) The upgrade of cable service was system wide and included a service which would allow two-way communication so that a subscriber could order pay-per-view movies and events, which were supposed to have been available only at residences. Mr. Sovacool did not discuss with MLL what services it was entitled to receive as a commercial establishment.

6.) The work order for the Account states that the account would receive a free 60-day special introductory package. Mr. Sovacool provided Melody Lane Lounge with a free pay-per-view movie, and a 60-day free special introductory package.

7.) The work order in Mr. Sovacool's possession at the time the installation was performed listed the Account as a residential account. This enabled the Account to order pay-per-view events at MLL. TWE does not employ different forms for its residential as opposed to its commercial customers. The only difference between a residential and commercial work order would be the information typed in to the appropriate space or line.

8.) After a TWE technician/sales representative makes a sale and installs proper boxes at an establishment, he or she calls in to the Time Warner Cable head-in center and tells the center what has been ordered. The center activates the service, which gives "personality" to the boxes by determining which services are received at the establishment. After calling the head-in center, the technician checks the boxes and reception to make sure that the customer is receiving the services ordered. The technician does not necessarily check to make

sure that the customer is receiving services that were not ordered.

9.) After he upgraded service at MLL, Mr. Sovacool did not check to make sure that MLL was not receiving services that it was not supposed to receive. Rather, he only checked to make sure that it was properly receiving the services that were listed on the work order.

10.) TWE trains the salespeople and installers to confirm the type of cable services being received at a location, to compare those services to TWE's records and to request correction if any is needed.

11.) Under TWE's policy and procedure, Mr. Sovacool should have reported to TWE that the service address was a commercial establishment instead of a residence. If he reported the error, the change should have been processed.

12.) No correction was made on the Account and the address remained on TWE's service system as a residential account.

13.) There is no evidence as to whether Mr. Sovacool willfully or accidentally failed to correct the account status. There is no proof that Mr. Sovacool noticed the inaccurate designation on the work order.

14.) On December 14, 1996, a championship boxing match took place between Riddick Bowe and Andrew Golota (the "Event"). The closed-circuit broadcast of the Event was not intended for the use of the general public. In Ohio, the closed-circuit broadcast of the Event could only be legally exhibited in a commercial establishment if said establishment was contractually authorized to do so by National.

15.) Commercial establishments which contracted with the plaintiff were required to pay to the plaintiff a sublicense fee to receive the Event. The sublicense fee was based on the product of the seating capacity of the establishment as

determined by the local fire or health department and a constant ($12.50). In addition, a $50.00 technical authorization fee was charged to each commercial establishment, which contracted with plaintiff to receive the Event. This fee could have been adjusted depending on other factors, such as the number of television sets on the premises, and the number of patrons attending. Based upon information obtained during discovery, it would have cost MLL nine hundred eighty seven dollars and fifty cents ($987.50) to acquire the Event from plaintiff on December 14, 1996.

16.) Plaintiff employed investigators to visit commercial establishments for the purpose of enforcing its distribution rights to the Event. Both National and TWE used investigators to visit commercial establishments on the night of the Event. This is a regular practice by both entities. On the night of the Event, plaintiff employed several agencies in Ohio that utilized the services of 13 investigators, who canvassed three counties, including the city of Massillon, Ohio, for which plaintiff paid a combined fee of $1,785.

17.) At the time the investigator entered MLL, there were approximately twenty three (23) patrons in the establishment. Had the same 23 persons instead purchased the Event individually through their cable provider, it would have collectively cost nine hundred eighteen dollars and eighty-five cents ($918.85) ($39.95 x 23).

18.) In this case, MLL did not contract with the plaintiff and did not pay the plaintiff a fee to exhibit the Event. Instead, it obtained the Event through a residential signal that TWE provided to it for a fee of thirty nine dollars and 95/100 cents ($39.95). MLL transmitted, divulged and published said Event to the patrons within MLL without the authorization of National.

19.) Defendant MLL did not advertise its display of the Event, nor did it charge a cover to its patrons for admission to view the telecast. MLL ordered the Event in response to demands from its customers on the same night the Event was broadcast. A bartender at MLL was able, by remote control or by punching numbers into a cable box, to order the Event and allow the patrons to watch the Event. Mr. Eliadis would not have purchased the Event if he had been given the opportunity to obtain a sublicense for $987.50.

20.) In addition, TWE also enabled, sold and provided an entity known as the Polish Club, a commercial establishment located at 1605 Henry Avenue, S.W., Canton, Ohio, with the Event. Although the Polish Club has a bar capacity of 30 to 40 people, only 4 people watched the Event.

21.) In January of 1997, plaintiff's general counsel corresponded with MLL advising it that an investigator in its employ had observed the unauthorized display of the Event at its establishment.

22.) Thereafter, on or about February 18, 1998, Mr. Eliadis provided a copy of his billing statement demonstrating that MLL had acquired the Event from Time Warner Cable.

23.) On December 17, 1997, TWE ran a "Pay-per-view History Inquiry" on the Account, which identified eleven pay-per-view events as being ordered by the Account which, as of the date of the inquiry, was in the name of APK, Inc., dba Melody Lane Lounge.

24.) Between 1995 and March 14, 1998, The Account purchased from TWE the "Cavs/Indians" package at the commercial rate of $30.00/month.

25.) TWE billing records for MLL indicate that it was receiving Cavs/Indians service which is designated as a

"commercial" service. MLL had been receiving this service since at least August of 1995.

26.) Despite being recorded as a residential account from February 15, 1996 (immediately after Mr. Sovacool completed the work order) onward MLL was charged by TWE at the commercial rate of $30.00/month for the "Cavs/Indians" package. Residential subscribers to the "Cavs/Indians" package paid $6.95 per month.

27.) National agreed to settle its claim against MLL on or about June 9, 1998, for $250.00.

28.) TWE pays technician sales representatives such as Mr. Sovacool strictly on a commission basis. These employees have little incentive to report the erroneous provision of premium or pay-per-view service to commercial establishments.

29.) TWE customarily places a "trap" on all of its commercial customers to ensure that they do not receive services for which they are not eligible. TWE also performs visual inspections of those traps to ensure they are operational.

30.) TWE's computerized billing and account system, which is run by a third party vendor, did not recognize inconsistencies within an account, such as billing a "residence" for a commercial package or allowing a commercial package subscriber to get pay-per-view. The system did not electronically alert TWE of the contradiction or otherwise limit what services MLL could order. Consequently, a human error in data processing or account coding can go unnoticed.

31.) TWE does not maintain a running list of commercial establishments that have a history of piracy. However, once it is discovered that a commercial establishment is receiving signals it is not eligible to receive, TWE corrects the listing in its billing system and discontinues the erroneous service.

32.) To properly and promptly verify, track and maintain the piracy information, plaintiff maintains a full-time staff of assistants and secretaries who verify the accuracy of the information received from investigators, track the information received to determine whether the particular persons involved have pirated past Events, and then maintain the information in cross-referenced form so that the information may be recalled for any and all necessary purposes.

33.) Piracy of programming poses a serious threat to the business interests of National, whose income depends primarily on its status as an exclusive licensee. Piracy also poses a threat to the goodwill of National's customers, who are less willing to pay for services if their competition is able to get them free through piracy. Plaintiff has suffered damage to its reputation and goodwill.

34.) National Satellite paid approximately 40 to 50 percent of its net profits to the licenser of the Event.

Findings of Law

1.) Because plaintiff's damages would be difficult to prove in this matter, it is appropriate for plaintiff to elect to receive statutory damages in this case. *See generally* 17 U.S.C. § 504(c)(l) (the Copyright Act). *See American Television and Communications Corp. v. Floken, Ltd.*, 629 F. Supp. 1462, 1466 (M.D. Fla. 1986) (value of business investment, business opportunities and goodwill); *Cox Cable Cleveland Area, Inc. v. King*, 582 F. Supp. 376, 381 (E.D. Ohio 1983) (losses from loss of future patrons of unauthorized broadcasts); *Quincy Cable Systems Inc. v. Sully's Bar, Inc.*, 640 F. Supp. 1159, 1161 (damage to goodwill and reputation).

2.) "Willful" within the meaning of this subdivision of the statute means a "disregard for the governing statute and an indifference to its requirements." In *ON/TV of Chicago v.*

Julien, 763 F.2d 839, 844 (7th Cir. 1985) (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 127 (1985)). Knowing or reckless disregard and indifference may be actual or constructive, and may be inferred from the defendant's conduct. *Peer Int'l. Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 568 (S.D.N.Y. 1995). "Reckless disregard of the . . . holder's right (rather than actual knowledge of infringement) suffices to warrant an award of the enhanced damages." *Id.* (quoting *NAS Import. Corp. v. Chenson Ent. Inc.*, 968 F.2d 250, 252 (2d Cir. 1992)); *Fitzgerald Publishing Co., Inc. v. Baylor Publishing Co., Inc.*, 807 F.2d 1110, 1115 (2d Cir. 1986), *aff'd*, 862 F.2d 304 (1988); *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 851 (11th Cir. 1990).

Disposition

Reflecting upon the above stated findings of fact, the Court finds that damages amount to $4,500. The evidence was insufficient to support a finding of willfulness however. There is no indication of a pattern of selling these unauthorized events to commercial establishments, nor was there any indication that TWE sold this particular event intentionally. Of course, a finding of willfulness under § 605 can be predicated merely on a "disregard for the governing statute and an indifference to its requirements." *ON/TV of Chicago v. Julien*, 763 F.2d 839, 844 (7th Cir. 1985) (quoting *Transworld Airlines, Inc. v. Thurston*, 469 U.S. 111, 127 (1985)). However, plaintiff is unable to point the Court to any case law whose facts support a finding of willfulness in this case. TWE's billing system fails to detect inconsistencies that, if detected, could aid in the protection of National Satellites' rights under its license. However, these errors seem to have led to only two discrepancies in Northeast Ohio out of possibly thousands of customers. TWE's practices are sloppy

and perhaps negligent, but they do not evince reckless disregard for National's rights. The Court wonders, however, whether TWE would have been able to correct its computer system for less money than it cost it to litigate this case.

Plaintiff National Satellite Sports, Inc. shall receive judgment in the amount of $4,500 plus costs from defendant Time Warner Entertainment, Inc. Plaintiff has leave until January 6, 2000 to submit an attorney fee application.

IT IS SO ORDERED.

/s/ David D. Dowd
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 5:97CV3096

NATIONAL SATELLITE SPORTS, INC.,
Plaintiff,

v.

ELIADIS, INC., ET AL.,
Defendants.

[December 13, 1999]

JUDGMENT

For the reasons set forth in the contemporaneously filed Memorandum Opinion, judgment is hereby entered in favor of plaintiff National Satellite Sports, Inc. against defendant Time Warner Entertainment Co. in the amount of $4,500 and costs. Plaintiff shall have leave until January 6, 2000 to submit an attorney fee application.

IT IS SO ORDERED.

/s/ David D. Dowd
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 5:97CV3096

NATIONAL SATELLITE SPORTS, INC.,
Plaintiff,

v.

ELIADIS, INC., ET AL.,
Defendants.

[March 23, 2000]

MEMORANDUM OPINION

The plaintiff, the prevailing party in this case, seeks an award of attorney fees and costs in the sum of $37,842.77.[1] (See Docket #96). The defendant, Time Warner Entertainment Co., has suffered a verdict against it for the sum of $4,500.00. The plaintiff's motion is anchored in the statutory right to an award of attorney fees in this case as set forth in 47 U.S.C. §§ 553(c)(2)(C) and 605(e)(3)(B)(iii).

[1] Lead counsel for the plaintiff, Michael D. Slodov, indicated in his application that he had spent 184.25 hours on the case and that an associate, James Oh, devoted an additional 7 hours at the time of the trial on the issue of damages. The total claimed for fees is the sum of $22,875.00. The total hours claimed (i.e., 184.25) is less than the itemization on the application that adds to 189 hours. Rather than attempt to recalculate the time devoted to the case by Slodov and Oh, the Court will consider the Slodov application to be for total fees in the sum of $22,875.00.

The defendant has opposed the application on the premise that the plaintiff recovered only nominal judgment and as a consequence the Court should follow the teachings of *Farrar v. Hobby*, 506 U.S. 103 (1992), and *TCI of Illinois, Inc. v. Carpenter*, 849 F.Supp. 326 (N.D. Ill. 1994) and award low fees or no fees at all. The Court disagrees with the defendant's description of the judgment. A judgment for $4,500 does not meet the definition of a "nominal amount" even if the sum appears insignificant to the defendant. A review of the docket reflects a hard fought case between the plaintiff and Time Warner. The docket entries now number 102. The Court conducted a trial on the issue of damages that produced a transcript of 166 pages. The Court entered six separate orders dealing with the substantive nature of the case.

Plaintiff's lead counsel, Michael D. Slodov, seeks an award of $22,875.00 in attorney fees.[2] An additional award of attorney fees coupled with a request for paralegal expense has been filed by Attorney Marcus Corwin of Florida, in the amount of $10,033.25. Finally, a request for costs in the sum of $4,934.97 is included in the application.

After reviewing the application and considering that the major work before the Court on behalf of the plaintiff was performed by Mr. Slodov, and the additional fact that Attorney Cowin was not listed as counsel of record in the case, but rather has an ownership interest in the plaintiff corporation, the Court declines to award fees to the Florida counsel.[3]

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[2] Mr. Slodov requests an hourly rate of $125. The defendant does not dispute that hourly rate and the Court finds that such an hourly rate for Mr. Slodov is justified. He was persistent in his devotion to the interests of his client and he was required to do an extraordinary amount of work in which appeared, at the outset, as a simple case.

[3] If the Court were to compute the attorney fees based upon a determination that there had been a duplication of effort by the lawyers seeking attorney fees on behalf of the plaintiff and also that the fee application was

Consequently, the plaintiff is granted attorney fees in the sum of $22,875.00.

The cost bill is summarized in the application follows:

A. Deposition	$1,459.05
B. Experts	0.00
C. Witness Fees	1,767.50
D. Other	1,707.42
Total	$4,933.97

The itemization of the costs is set forth in Exhibit B attached to the application and a copy is attached hereto as Appendix 1. The defendant challenges most, if not all, of the requested costs. One of the requested claims is for Westlaw research in a total sum of $1,182.60. The Court is of the view that the attorney fee award based on the number of hours times the allowable rate incorporates whatever research tools the prevailing party chooses to use and the cost of outside research is captured with the attorney hourly rate and so the research cost is not allowed.[4] The Court also strikes the cost of copying the supplemental brief in the sum of $236.72. The disallowed costs total $1,419.32 and the rest of the cost bill is allowed for a total allowance of $3,514.65.

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excessive in terms of the hourly rate sought by Florida counsel, the Court would reduce the application by a factor of 30%. The amount sought by Attorney Slodov is just slightly less than 70% of the total application for attorney fees, i.e., 69.5% of the fee application.

[4] Furthermore, the Court notes that there is no way to evaluate, on the material submitted, whether the charged Westlaw time related in whole or in part to the case at hand.

The Court will publish a separate order granting the application for attorney fees and costs in the total sum of $26,389.65.

IT IS SO ORDERED.

/s/ David D. Dowd
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 5:97CV3096

NATIONAL SATELLITE SPORTS, INC.,
Plaintiff,

v.

ELIADIS, INC., ET AL.,
Defendants.

[March 23, 2000]

JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion, filed contemporaneously with this Order, the plaintiff is granted judgment against the defendant Time Warner Entertainment Company for attorney fees in the sum of $22,875.00 plus costs in the sum of $3,514.65 for a total of $26,389.65.

IT IS SO ORDERED.

/s/ David D. Dowd
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-3013 & 00-3437

NATIONAL SATELLITE SPORTS, INC.,
Plaintiff-Appellee,

v.

ELIADIS, INC., D/B/A MELODY LANE LOUNGE, ET AL.,
Defendants,

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
D/B/A TIME WARNER CABLE,
Defendant-Appellant.

[August 9, 2001]

Before: JONES, SILER, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, Clerk

APPENDIX H

[1]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NATIONAL SATELLITE SPORTS, INC.,
Plaintiff,

vs.

LYNSTALDER, INC., et al.,
Defendants.

Case No. 5:97CV2039

Youngstown, Ohio
Monday, July 13, 1998
8:15 a.m.

TRANSCRIPT OF ORAL ARGUMENT
ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
BEFORE THE HONORABLE JAMES D. THOMAS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff National Satellite Sports, Inc.:

Michael D. Slodov
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and
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For the Defendant Time Warner Entertainment Co.:

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Akron, Ohio 44308-1322

and
Daniel J. Lefkowitz
and Wayne R. Louis
350 Jericho Turnpike, Suite 100
Jericho, New York 11753

Court Reporter: Caroline Mahnke, RMR
Federal Building & U.S. Courthouse
125 Market Street
Youngstown, Ohio 44503
(330) 747-8754

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

[2]

THE COURT: Good morning. Let the record reflect the case is National Satellite versus Lynstalder, Inc., et al., Case Number 97CV2039.

* * * * *

[32]

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THE COURT: * * * * *

Let me state for the record that I've considered the [33] motion which was filed at Docket 46. It was filed on June 5, 1998. And I've considered plaintiff's memorandum in opposition which is at Docket Number 52, filed on July 2, and the defendant's reply. I've also considered the arguments that have been advanced here this morning by all parties.

This is, in part, some context before I issue the ruling from the bench here today.

It is not my practice to issue rulings on the day of the bench trial and I apologize to both parties for this. At the same time, the circumstances of this case dictated me addressing the motion this morning.

And I don't need to go over the course of this case or the adversarial nature between the remaining two parties because it's been somewhat intense, requiring a lot of Court action.

This case was set for trial by agreement of the parties back, I believe, in March at Docket Number 28. We've all been aware of the trial date. We've all pushed ourselves back up to this point.

For the reasons that I'm going to state on the record, I'm going to grant the motion for summary judgment and dismiss the claims by plaintiff against the defendant.

And I'm going to articulate my reasons on the record because I won't be issuing a written memorandum order, and [34] this will be your stated reasons. And I'm sure both parties will more than likely have a disagreement over everything I say, pretty much, and you can take it up to the Sixth Circuit and they can tell us whether I was right or wrong.

I have an outline of what I'm going to try to articulate, my reasons.

First, two procedural notes. I want to indicate for the record that this ruling assumes that any reader of the transcript of this ruling is familiar with the pleadings outlined here in the hearing conducted earlier today. In short, I won't be giving any detailed discussion of the background of facts or the arguments unless noted here.

The reader's familiarity with both, i.e. the background and the arguments, is assumed by me at this point.

Because of this, I view this decision as expressly limited to the facts and circumstances presented in this case and any citation of this decision by counsel is disfavored by me except for the purpose of establishing res judicata, estoppel or law of the case. And I would ask you to compare that to Rule 24 of the Sixth Circuit Court of Appeals. This decision is expressly limited to the facts and circumstances of this case.

Second, because this is going to be my statement of findings, I'll note that this matter is before me pursuant to the consent jurisdiction of the United States Magistrate [35] Judge under 28 United States Code Section 636(c). Any appeal of this decision, therefore, is to the United States Court of Appeals.

With regard to the ruling, plaintiff has failed to state a claim pursuant to the terms of the contracts at issue in this case as well as 47 United States Code Section 605.

There are two bases for the decision. That's the contractual bar and the language or the provision of 47 U.S.C. Section 605.

And first, the contractual bar. As outlined in the pleadings, the December 8, 1995 Closed Circuit Television License Agreement between Time Warner Sports and Joe Hand Promotions, Inc. establishes several important, I believe, undisputed facts in this case.

First, under paragraphs 17(a) and (b), the Television License Agreement dated December 8, 1995 incorporates the terms and conditions of Exhibit A and B to that agreement.

Exhibit A is the terms to be included in any closed circuit television sublicense agreement. Exhibit B are standard terms and conditions for that agreement, i.e., the TVLA agreement, and any sublicense agreements.

This is a fully integrated agreement. Paragraph 22 of Exhibit B of the Television License Agreement provides for such. That paragraph further provides that any [36] modifications must be in writing, signed by both parties.

And for purposes of the Television License Agreement of Time Warner Sports and Joe Hand Promotions, paragraph 11(b) indicates or provides that Joe Hand was responsible for creating a separate encoded signal in accordance with Section 2 of that agreement which defines the Events.

There is no dispute on this issue.

Paragraph 14(e) of the Television Licensing Agreement provides for the enforcement of unauthorized display of the closed circuit television feed. That also provides that Joe Hand Promotions could not assert any piracy claim without prior notice.

It specifically provides that a sublicensee has no rights to enforceability, quote, "It being understood that your sublicensee shall have no right to commence or settle any claim or litigation hereunder."

The other relevant agreement is the March 12, 1996 Closed Circuit Television Agreement entered into between Joe Hand Promotions and National Satellite Sports.

That agreement at paragraph 7 provides that there is no right to a piracy action to be pursued by National Satellite. Mr. Corwin's affidavit filed in opposition to the motion for summary judgment at paragraph 4 specifically concedes this point.

Plaintiff's effort to overcome the language of the [37] contract does not create a material issue of fact for trial.

To the extent plaintiff relies on Parol Evidence, that evidence is not proper under Rule 56(e) in light of the integrated

agreements identified above, the March 12 agreement and the December 8 agreement.

Even considering that evidence, the plaintiff's claims fail to establish a right to proceed with a piracy action under the contracts.

Any subsequent agreement between Joe Hand and plaintiff cannot overcome or amend or modify the terms as between Time Warner Sports and Joe Hand. As noted earlier, any amendments or modifications must be in writing.

Further, I reviewed the exhibits referenced in that same paragraph 4 of Mr. Corwin's affidavit regarding subsequent modifications, oral modifications, and I find them not to create an issue of fact given the Parol Evidence Rule and also that these letters were all entered into after the date of the alleged fight in this case as well as the fact that they are between — appear to be between Joe Hand and National Satellite, and again, cannot amend the agreement between Time Warner Sports and Joe Hand.

With regard to Section 605 statutory language, the statute defines a person aggrieved as a person who is entitled to file suit for a violation under 47 U.S. Code [38] Section 605(a), which includes any person with propriety rights in the intercepted communication.

In this case, I don't think there is any dispute that the communication at issue was the HBO network feed and not the closed circuit television feed which was what Joe Hand and then subsequently National Satellite had an interest in.

And based upon that, those undisputed facts, plaintiff has failed to state a Section 605 claim as an aggrieved person.

Those are the reasons for the Court's ruling on the motion for summary judgment, and I will make only two comments regarding the decision.

First, that one may, I, myself — the question is what then is National Satellite's remedy for what is admitted to be an unauthorized and nonlicensed transmission? And I say "admitted" because the request for admissions that were submitted by National Satellite to defendant Time Warner specifically asked Time Warner to admit or deny that it was — I think it was in request number one, whether they had authority for a license to transmit. And it was admitted — I thought it was admitted that they did not.

But in any event, even using Mr. Lefkowitz's admission that it was a mistake or negligence, my reaction is what is National Satellite's remedy?

[39] Well, from what I can tell from the case and what is argument before the Court in a motion to amend the complaint to add Time Warner in a breach of contract claim without seeking to add Joe Hand Promotions, it appears to me that that is indeed the remedy for a person in National Satellite's position, is to file a breach of contract claim against Joe Hand Promotions and then also bringing in Time Warner.

That was not the claim I was going to allow to be pursued at the time it was brought before this case, and I've already set forth my decision with respect to the motion to amend in this case, but it doesn't appear to me that that precludes a remedy for National Satellite.

And second is a procedural comment. The easiest thing for me to have done today would be to hear all the evidence. The parties are all here. Everyone is ready to go. Counsel have done a good job in putting everything together for trial.

But that would be a disservice to summary judgment mechanisms of the Federal Rules of Civil Procedure and also to contract language that appears to me to be fairly clear. And I have made a decision to grant the motion for summary

judgment and let the parties go from there, to argue what they may from here on out.

I will enter a final judgment in the next couple days [40] incorporating the ruling on the motion for summary judgment and the stipulated dismissal with respect to Coach's. And with that, that will conclude the matter.

* * * * *

APPENDIX I

Section 705 of the Communications Act of 1934, 47 U.S.C. § 605, provides as follows:

§ 605. Unauthorized publication or use of communications

(a) Practices prohibited

Except as authorized by chapter 119, title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the

existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is transmitted by any station for the use of the general public, which relates to ships, aircraft, vehicles, or persons in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator.

(b) Exceptions

The provisions of subsection (a) of this section shall not apply to the interception or receipt by any individual, or the assisting (including the manufacture or sale) of such interception or receipt, of any satellite cable programming for private viewing if —

(1) the programming involved is not encrypted; and

(2)(A) a marketing system is not established under which —

(i) an agent or agents have been lawfully designated for the purpose of authorizing private viewing by individuals, and

(ii) such authorization is available to the individual involved from the appropriate agent or agents; or

(B) a marketing system described in subparagraph (A) is established and the individuals receiving such programming has obtained authorization for private viewing under that system.

(c) Scrambling of Public Broadcasting Service programming

No person shall encrypt or continue to encrypt satellite delivered programs included in the National Program Service of the Public Broadcasting Service and intended for public viewing by retransmission by television broadcast stations; except that as long as at least one unencrypted satellite transmission of any program subject to this subsection is provided, this subsection shall not prohibit additional encrypted satellite transmissions of the same program.

(d) Definitions

For purposes of this section —

(1) the term "satellite cable programming" means video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers;

(2) the term "agent", with respect to any person, includes an employee of such person;

(3) the term "encrypt", when used with respect to satellite cable programming, means to transmit such programming in a form whereby the aural and visual characteristics (or both) are modified or altered for the purpose of preventing the unauthorized receipt of such programming by persons without authorized equipment which is designed to eliminate the effects of such modification or alteration;

(4) the term "private viewing" means the viewing for private use in an individual's dwelling unit by means of equipment, owned or operated by such individual, capable of receiving satellite cable programming directly from a satellite;

(5) the term "private financial gain" shall not include the gain resulting to any individual for the private use in such individual's dwelling unit of any programming for which the individual has not obtained authorization for that use; and

(6) the term "any person aggrieved" shall include any person with proprietary rights in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite cable programming, and, in the case of a violation of paragraph (4) of subsection (e) of this section, shall also include any person engaged in the lawful manufacture, distribution, or sale of equipment necessary to authorize or receive satellite cable programming.

(e) Penalties; civil actions; remedies; attorney's fees and costs; computation of damages; regulation by State and local authorities

(1) Any person who willfully violates subsection (a) of this section shall be fined not more than $2,000 or imprisoned for not more than 6 months, or both.

(2) Any person who violates subsection (a) of this section willfully and for purposes of direct or indirect commercial advantage or private financial gain shall be fined not more than $50,000 or imprisoned for not more than 2 years, or both, for the first such conviction and shall be fined not more than $100,000 or imprisoned for not more than 5 years, or both, for any subsequent conviction.

(3)(A) Any person aggrieved by any violation of subsection (a) of this section or paragraph (4) of this subsection may bring a civil action in a United States district court or in any other court of competent jurisdiction.

(B) The court —

(i) may grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a) of this section;

(ii) may award damages as described in subparagraph (C); and

(iii) shall direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

(C)(i) Damages awarded by any court under this section shall be computed, at the election of the aggrieved party, in accordance with either of the following subclauses;

(I) the party aggrieved may recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or

(II) the party aggrieved may recover an award of statutory damages for each violation of subsection (a) of this section involved in the action in a sum of not less than $1,000 or more than $10,000, as the court considers just, and for each violation of paragraph (4) of this subsection involved in the action an aggrieved party may recover statutory damages in a sum not less than $10,000, or more than $100,000, as the court considers just.

(ii) In any case in which the court finds that the violation was committed willfully and for purposes of direct or indirect commercial advantage or private financial gain, the court in

its discretion may increase the award of damages, whether actual or statutory, by an amount of not more than $100,000 for each violation of subsection (a) of this section.

(iii) In any case where the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than $250.

(4) Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services, or is intended for any other activity prohibited by subsection (a) of this section, shall be fined not more than $500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both. For purposes of all penalties and remedies established for violations of this paragraph, the prohibited activity established herein as it applies to each such device shall be deemed a separate violation.

(5) The penalties under this subsection shall be in addition to those prescribed under any other provision of this subchapter.

(6) Nothing in this subsection shall prevent any State, or political subdivision thereof, from enacting or enforcing any laws with respect to the importation, sale, manufacture, or distribution of equipment by any person with the intent of its use to assist in the interception or receipt of radio communications prohibited by subsection (a) of this section.

(f) Rights, obligations, and liabilities under other laws unaffected

Nothing in this section shall affect any right, obligation, or liability under title 17, any rule, regulation, or order thereunder, or any other applicable Federal, State, or local law.

(g) Universal encryption standard

The Commission shall initiate an inquiry concerning the need for a universal encryption standard that permits decryption of satellite cable programming intended for private viewing. In conducting such inquiry, the Commission shall take into account —

(1) consumer costs and benefits of any such standard, including consumer investment in equipment in operation;

(2) incorporation of technological enhancements, including advanced television formats;

(3) whether any such standard would effectively prevent present and future unauthorized decryption of satellite cable programming;

(4) the costs and benefits of any such standard on other authorized users of encrypted satellite cable programming, including cable systems and satellite master antenna television systems;

(5) the effect of any such standard on competition in the manufacture of decryption equipment; and

(6) the impact of the time delay associated with the Commission procedures necessary for establishment of such standards.

(h) Rulemaking for encryption standard

If the Commission finds, based on the information gathered from the inquiry required by subsection (g) of this section,

that a universal encryption standard is necessary and in the public interest, the Commission shall initiate a rulemaking to establish such a standard.